

(34)

FILED
JUN 4 1945
CLERK OF SUPREME COURT
U.S.

IN THE
Supreme Court of the United States
October Term 1944

No. ~~1333~~ 105

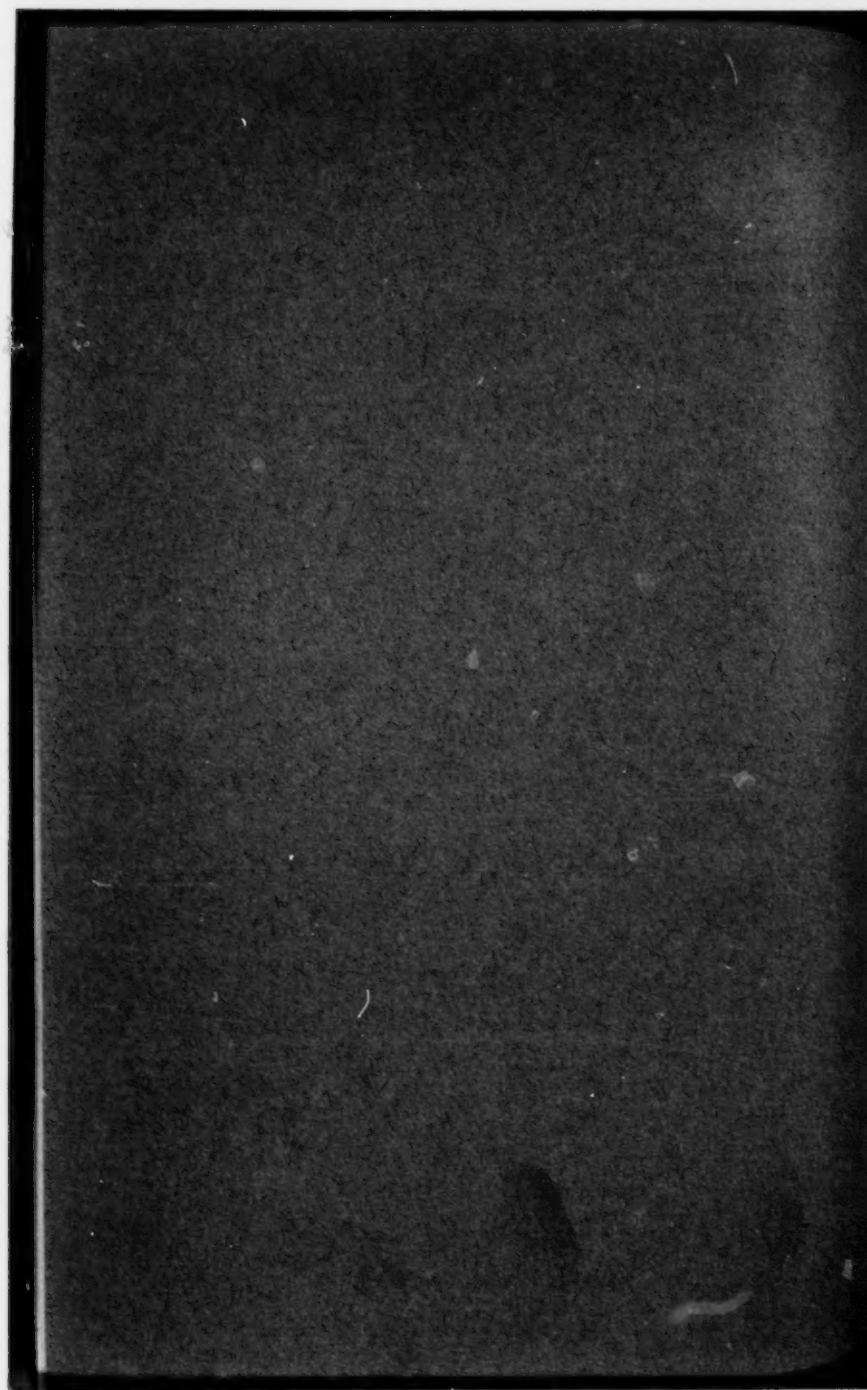
SHINYU NORO and SHOIE M. GOTO.
PETITIONERS,

vs.

UNITED STATES OF AMERICA
RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WIL. C. FINCH
214 Madison Street
Tampa, Florida.
Attorney for Petitioner



INDEX

I. Summary and Short Statement	Page 2-3
II. The Decision of the United States Circuit Court of Appeals for the Fifth Circuit.....	3
III. Basis of Jurisdiction	4
IV. Questions Presented	4-5
V. Statutes, Constitutional Provisions, Etc., Involved	5
VI. Reasons for Granting the Petition	5-7
VII. Nature of Case, Statement of Grounds, Questions Involved are Substantial, and Cases Sustaining Jurisdiction	7-11
Exhibit A (Opinion of the Circuit Court of Ap- peals for the Fifth Circuit)	14-19

AUTHORITIES CITED

Abrams vs. U. S., 250 U. S. 616	7
Adams vs. People of the State of New York, 192 U. S. 585	6
Agnello vs. U. S., 269 U. S. 20	6
Amos vs. United States, 255 U. S. 313	6
Boyd vs. U. S., 116 U. S. 616	6
Ex Parte Kumezo Kawato, 317 U. S. 69	6
Glasser vs. U. S., 315 U. S. 60	7
Goldman vs. U. S., 245 U. S. 474	7
Gouled vs. U. S., 255 U. S. 298	6
Kramer vs. U. S., 245 U. S. 478	7
Manning vs. John Hancock Mutual Life Insur- ance Co., 100 U. S. 693	7
Mortensen vs. U. S., 322 U. S. 369	7
Silverthorne Lumber Company vs. United States, 251 U. S. 385	6
Stilson vs. U. S., 250 U. S. 583	7
U. S. vs. Socony-Vacuum Oil Co., 310 U. S. 150	7
Weeks vs. U. S., 232 U. S. 383	6
Wong Wing vs. U. S., 163 U. S. 228	6
Yick Wo vs. Hopkins, 118 U. S. 356	6

INDEX (Continued)

Page

STATUTES INVOLVED

Section 240 (a) of the Judicial Code of the United States, as amended. 28 USCA 347 (a)	4
40 Stat. 411, as amended May 7, 1940	4-5; 6
Sec. 5 (b) of Trading With the Enemy Act	5; 6; 9
Presidential Proclamation No. 2525, 6 Fed. Reg. 6321, predicated upon Sections 21-24 of Title 50, USCA	5; 6; 9
Fourth Amendment, Constitution of the United States	4; 7-8; 9
Fifth Amendment, Constitution of the United States	4; 7-8; 9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No.

SHINYU NORO and SHOIE M. GOTO,
PETITIONERS,
vs.
UNITED STATES OF AMERICA
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES
OF AMERICA:

Petitioners, Shinyu Noro and Shoie M. Goto, pray that a Writ of Certiorari issue to review the decision and judgment of the Circuit Court of Appeals for the Fifth Circuit, entered April 24, 1945 (R-144-152), affirming the judgments of guilt and sentences imposed upon petitioners by the District Court of the United States for the Southern District of Florida, on December 21, 1943. (R-22-25). Petition for rehearing in said cause was denied by said Circuit Court of Appeals on May 17, 1945. (R-157).

I.

SUMMARY AND SHORT STATEMENT

Petitioners were tried and convicted in the District Court of the United States for the Southern District of Florida upon an indictment containing six counts. (R-1-22). In five counts Noro was charged with having wilfully and knowingly attempted to defeat a portion of his individual income taxes by making false returns for the tax years 1936 to 1940 inclusive, and in said counts Goto was charged with aiding and abetting. The sixth count charged a conspiracy among them and another to accomplish such alleged purposes. Petitioners were convicted on all counts and were sentenced to imprisonment for one year and to pay costs of the prosecution. (R-22-25).

Petitioners are Japanese subjects but for years past have been peaceable residents in this country. They were, during the year 1941, engaged in the business of operating a cafe known as Nikko Inn, located in St. Petersburg, Florida. On December 8, 1941, at 5:30 P. M., U. S. Customs officers from Tampa, Florida, twenty miles away, entered Nikko Inn and seized all books of account, documents and papers used in the conduct of said business, and also seized certain currency. One book of account was kept in Japanese, and one in English. Entries of receipts in the Japanese book reflected a larger income of Nikko Inn than did the entries in the English book.

The Customs officers were not armed with any search warrant, neither did they have any warrant for the arrest of anyone. (R-47; 52). The Customs officers had ample time within which to obtain a search warrant for petitioners' place of business. This fact is conceded

in the opinion of the Circuit Court of Appeals. (R-147-148).

The officers contended they were proceeding upon the authority of telegraphic instructions received from the Commissioner of Customs, Washington, D. C., and a Foreign Funds Control Officer of the Federal Reserve Bank in Atlanta, Georgia. (R-36-37). On December 18th, 1941, the Customs officers delivered the books and records so seized to an agent of the Internal Revenue Department for audit. The audit led to the indictment and prosecution of petitioners as above set forth. Over timely objection, said books, records and documents were introduced in evidence against petitioners. Such introduction violated petitioners' rights under the Fourth and Fifth Amendments. (R-55).

There is no entry in either of the sets of books that would establish, or tend to establish, that Noro, or Goto, were paid, or were entitled to be paid, any distributive share of the moneys received by Nikko Inn, or if so, what such distributive share was. Neither of the two ledgers show who received a distributive share in the profits reflected by the books at the close of the fiscal year. Thus the factual crux of the case, Noro's individual income, was never established.

II.

THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, entered April 24, 1945, is not yet reported but is attached as an appendix hereto, marked Exhibit A.

III.

BASIS OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment and opinion entered in this cause by the United States Circuit Court of Appeals for the Fifth Circuit, under the provisions of Section 240 (a) of the Judicial Code of the United States, as amended. 28 U.S.C.A. 347 (a).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed April 24, 1945. Order Denying Rehearing was filed May 17, 1945, and this Petition is presented and filed in the office of the Clerk of this Honorable Court within a time less than thirty days therefrom.

IV.

QUESTIONS PRESENTED

The fundamental questions presented in this Petition are as follows:

(1) The Circuit Court of Appeals erred in holding in its opinion and judgment (Exhibit A) that the search of Nikko Inn and the seizure of the business records of said business, the property of petitioners, by government officials without authority of search warrant or other legal process, and the introduction in evidence of such records over the timely objection of petitioners was not in violation of the rights secured to petitioners under the Fourth Amendment relating to unreasonable searches and seizures, nor of the Fifth Amendment protecting against self-incrimination. The Court of Appeals grounded its decision upon the provisions of 40

Stat. 411, as amended May 7, 1940; Sec. 5 (b) of Trading with the Enemy Act; Presidential Orders whereby the Secretary of the Treasury was directed to take charge of the licensing of the businesses of certain nationals, including the Japanese; and Presidential Proclamation numbered 2525, 6 Fed. Reg. 6321, predicated upon Sections 21-24 of Title 50, U. S. Code.

(2) The Circuit Court of Appeals in and by its opinion and Judgment (Exhibit A) erred in holding that the evidence in this case is legally sufficient to establish that the petitioner Noro, whose personal income is alone involved, received any income that was in excess of that sum included by him in his tax returns during the years in question, whereas the record wholly fails to prove what Noro's actual income was for those years, or that it was any different from what was included on the returns.

V.

STATUTES, CONSTITUTIONAL PROVISIONS, ETC., INVOLVED

The statutes, constitutional provisions, executive proclamations, and executive orders involved, are set forth in the appendix to the accompanying brief, marked Exhibit A thereof, and by reference made a part of this petition.

VI.

REASONS FOR GRANTING THE PETITION

(1) The Circuit Court of Appeals, in holding that the search of Nikko Inn and the seizure of the business records of said business, the property of petitioners, by

government officials without authority of search warrant or other judicial process, and the introduction in evidence of such records over the timely objection of petitioners was not in violation of the rights secured to petitioners under the Fourth and Fifth Amendments, and justifying the same because of the provisions of 40 Stat. 411, as amended May 17, 1940, Sec. 5 (b) of Trading With the Enemy Act; Presidential Proclamations whereby the Secretary of the Treasury was directed to take charge of the licensing of the businesses of certain nationals, including the Japanese; and because of Presidential Proclamation numbered 2525, 6 Fed. Reg. 6321, predicated upon Sections 21-24 of Title 50 U. S. Code, has decided an important Federal question in a way that is probably in conflict with applicable decisions of this Honorable Court, to-wit:

Ex Parte Kumezo Kawato, 317 U. S. 69.

Boyd vs. U. S., 116 U. S. 616.

Adams vs. New York, 192 U. S. 585.

Weeks vs. U. S., 232 U. S. 382.

Silverthorne Lumber Company vs. United States,
251 U. S. 385.

Gouled vs. United States, 255 U. S. 298.

Amos vs. United States, 255 U. S. 313.

Agnello vs. U. S., 269 U. S. 20.

Yick Wo vs. Hopkins, 118 U. S. 356.

Wong Wing vs. U. S., 163 U. S. 228.

(2) The Circuit Court of Appeals, in holding that the evidence in this case is legally sufficient to support the judgment and sentence, when the record contains no evidence establishing that Noro received a personal income from the Nikko Inn during the years in question greater than that which he reported and paid tax thereon, has decided a federal question in a way probably in conflict with the applicable decisions of this Honorable Court, to-wit:

Manning vs. John Hancock Mutual Life Insurance Company, 100 U. S. 693.

Goldman vs. U. S., 245 U. S. 474.

Kramer vs. U. S., 245 U. S. 478.

Stilson vs. U. S., 250 U. S. 583.

Glasser vs. U. S., 315 U. S. 60.

Abrams vs. U. S., 250 U. S. 616.

U. S. vs. Socony-Vacuum Oil Co., 310 U. S. 150.

Mortensen vs. U. S., 322 U. S. 369.

VII.

NATURE OF CASE, STATEMENT OF GROUNDS, QUESTIONS INVOLVED ARE SUBSTANTIAL, AND CASES SUSTAINING JURISDICTION

The nature of this case is such that if the judgment of the Circuit Court of Appeals is not reviewed and reversed, petitioners herein, as persons residing in this country, although Japanese subjects, will have been denied rights guaranteed to them under the Fourth and Fifth Amendments to the Constitution of the United

States, merely because of the view of the Circuit Court of Appeals that certain Acts of Congress and Presidential Orders provided authority for the acts committed in violation of the constitutional prohibition. Also, petitioners stand convicted and will serve the sentences imposed by the trial court, unless the judgment of the Circuit Court of Appeals is here reviewed and reversed, although the proof of the government at the trial wholly failed to establish the most important and material fact necessary to be proved under the indictment.

It is contended that petitioners operated a restaurant in St. Petersburg, Florida, known as Nikko Inn. They were Japanese subjects, although having resided in the United States for a long number of years prior to Pearl Harbor. On June 8, 1941, at 5:30 P. M., (one hour and twenty minutes after war was declared by Congress against Japan) federal officers, assisted by a battalion of local constabulary, raided the Nikko Inn during a time of active operation thereof and proceeded to take possession of the entire business and all personal property pertaining thereto and contained therein. Patrons were allowed to leave. Petitioners, after extensive questioning, were permitted to go home but not allowed to return until further permission should be granted. All moneys, personal effects, personal property, furnishings, fixtures and books and records of the business were taken into possession by the federal officers. The account books of the business were subsequently transmitted by the customs officers to the internal revenue agents in Tampa, Florida, and upon investigation and analysis were later used in support of a prosecution against petitioners, as the supposed operators of the business, for attempting to evade payment of income

tax by Noro personally. Petitioner Goto was charged with aiding and abetting Noro therein.

At the time of the search and seizure aforesaid the officers had no search warrant or warrant for arrest. The officers at the time of the raid did not presume to exhibit any legal authority to petitioners to justify the search and seizure. They merely told petitioners that this country and Japan were at war and they were there to take over their business and everything in it and that petitioners must remain away.

At the argument before the Court of Appeals, government counsel even contended that petitioners, as alien enemies at the time of the search, could not claim protection under the Fourth and Fifth Amendments. Such contention, clearly erroneous, was not received favorably even by the appellate court. Instead, the Court of Appeals believed that the Trading With the Enemy Act, as amended by Joint Resolution of May 7, 1940, the executive orders granting certain powers to the Secretary of the Treasury pursuant to the Trading With the Enemy Act, and the Presidential Proclamation of December 7, 1941, No. 2525, were sufficient to sustain the action taken by the officers.

These statutes and executive orders do not convey such authority. The petitioners discuss here only the nature of the case and not the extensive argument pertaining to their contentions, which will be found elsewhere in this petition and in the supporting brief. Constitutional guaranties of the Fourth and Fifth Amendments are fundamental and embrace under their protecting clause both American citizens and foreign subjects residing in this country. The amendments use the words "person" and "people" as the class to be protected, unlike the Fourteenth Amendment which uses

the word "citizen". Neither an Act of Congress nor a Presidential Order pursuant to an Act of Congress could hardly over-ride a constitutional provision or justify the violation of a constitutional right. But an analysis of the statutes and Orders referred to will reveal that they do not even presume or purport to provide such authority as was exercised in this case.

Another fundamental element in the nature of this case is the fact that while petitioners are charged with attempting to evade the payment by Noro of his personal income taxes for the years 1936 to 1940, inclusive, the proof for the government wholly failed to disclose or establish what his actual income or earnings consisted of during those years. It appeared from the evidence that he was an employee and probably had some proprietary interest in the operation of the Nikko Inn during those years. But the proof did not show what his earnings from the business were or what his distributive share of the net profits was for any year. The most that the evidence showed from the books of account and otherwise was what the total net earnings of the business amounted to. The question of who the partners were during the years involved, what their respective interest in the business was, what their respective distributive share in the net income was, and what amount of money was paid to such persons as salaries, division of net income, or otherwise, are wholly unanswered. Noro's individual income can only be arrived at by speculation and conjecture.

It is earnestly contended that the questions here involved are substantial. They are such that affect the fundamental rights of a person under the Constitution. Merely because petitioners are Japanese subjects should not warrant visitation upon them of flagrant violations

of constitutional privileges to which they, along with American citizens, are entitled so long as they reside here, nor should the Courts of the land permit a conviction of them under federal peace-time criminal statutes, even though Japanese subjects, if a fundamental defect exists in the proof of the offense charged.

Cases believed to sustain the jurisdiction of this Court as showing the substantial character of the questions here presented are those cases hereinbefore cited under Section VI of this petition, wherein is contained the reasons for granting the petition, and the Court is respectfully referred thereto, so as to avoid repetition at this point.

— — — — —

WHEREFORE it is respectfully submitted that this petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit be granted.

WM. C. PIERCE
214 Madison Street
Tampa 2, Florida
Attorney for Petitioners.



EXHIBIT A

OPINION OF THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT,
DATED APRIL 24, 1945.

Before SIBLEY, WALLER, and LEE,
Circuit Judges.

SIBLEY, Circuit Judge: The appellants were indicted in six counts, five charging Noro with having wilfully and knowingly attempted to defeat a large part of his income taxes by making false returns, for the years, 1936, 1937, 1938, 1939 and 1940, Goto aiding and abetting. The sixth count charges a conspiracy among them and another to do this. They were convicted on all counts, and a general sentence imposed of imprisonment for one year, and to pay the costs of prosecution. They appeal. The questions argued are: 1. Whether the entry of the place of business of appellants and the seizure of their account books was a violation of the Fourth Amendment of the Constitution prohibiting unreasonable searches and seizures, and the use of them in evidence violated the Fifth Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself. 2. Whether the evidence supports the verdict.

1. The books seized, when later examined, included one set kept in Japanese, and one in English, covering each day's business with monthly totalings. They agreed as to payments out but the receipts were much larger, in some years three times larger, according to the Japanese books than as shown by the English books. The income tax returns followed the English books and the falsity in them is proved only by resort to the Japanese books. The propriety of the use of these books in evidence is vital to the case.

The search and seizure were admittedly without any search warrant or warrent of arrest. The justifying facts, also uncontested, are that Noro and Goto, though residing for years peaceably in the United States, are citizens of the Japanese Empire; that on Dec. 7, 1941, following the attack on Pearl Harbor, the Congress declared war on Japan; and the following evening, on specific instructions from the Secretary of the Treasury, and a proclamation by the President touching alien enemies, appellants' place of business, a restaurant called Nikko Inn, was entered and searched by customs officers, with orders to seize among other things the books of the business. Other Japanese business places in and around the City were similarly searched. Noro and Goto submitted to the search, pointed out the books, and were allowed to depart. No one was arrested.

On May 7, 1940, Sect. 5(b) of the Trading With the Enemy Act was so amended as to authorize the President during time of war or any period of national emergency declared by him, to investigate, regulate or prohibit certain commercial dealings in which foreign States or nationals were interested, and gave him power to require any person to give information about them "including the production of any books of account . . . in connection therewith in the custody or control of such person". 40 Stats. 411. Section 2 of this legislation expressly confirmed action by the President which had vested these powers in the Secretary of the Treasury, and his regulations and rulings. Shortly before, the President had declared a period of national emergency and authorized the Secretary of the Treasury to proceed by licensing the business of certain nationals; and shortly afterwards the nationals of China and Japan were included. Nikko Inn had such a license from the Secretary of the Treasury. Promptly after Pearl Har-

bor, on Dec. 7, 1941, the Secretary revoked all licenses issued for the benefit of Japan or any national thereof, and ordered that customs officers and others take possession of the Japanese enterprises which had been licensed, and prevent access to, alteration or removal of books, files, accounts and other property of such enterprises. Before the Nikko Inn was taken into possession under this order, on Dec. 7, 1941, the President issued his proclamation No. 2525, 6 Fed. Reg. 6321, applicable to all land and water within the jurisdiction of the United States, forbidding any alien enemy to have in possession, custody or control, besides firearms, ammunition, bombs, codes and ciphers, cameras, and the like, "papers, documents or books in which there may be invisible writing"; and all such property found in the possession of any alien enemy was declared subject to seizure and forfeiture. Matters so standing, the customs officers on Dec. 8, 1941, took possession of Nikko Inn, and of the books in question and all other papers found there. Shortly afterwards on Dec. 18, 1941, by the First War Powers Act, 55 Stats. 839, Congress provided expressly for such seizures, and in Sect. 302 ratified and confirmed all actions and orders theretofore taken or issued by or pursuant to the direction of the President or Secretary of the Treasury under the former law. That same day the customs officers permitted an Internal Revenue Department representative to examine the books, which examination resulted in the assessment of deficiencies in taxes, and in this prosecution.

1. It was said in argument that in time of war alien enemies are not protected by the constitutional provisions in question. It may be true that they may by executive power be summarily arrested and interned and their property sequestered. Nevertheless we think that in a civil court trying an alien enemy for a crime com-

mitted in peace time, the constitutional safeguards of the accused ought to be maintained.

Therefore the accused may not in his trial be compelled to be a witness against himself. But this constitutional safeguard was not here violated. Neither of the accused testified at all. The written statements made by them and offered against them were excluded as not freely and voluntarily made. They were not required to produce in court any books or papers, as in *Boyd vs. United States*, 116 U. S. 616. It is true that during the search on May 8, 1941, they pointed out the box containing the books, but they were merely yielding to the search and the books would have been found and taken anyhow.

The question narrows to whether that search was an unconstitutional search. We think it was not. It is true that there had been time to get a search warrant to search Nikko Inn, if someone could have been found able to make oath to reasonable cause for a judicial officer under any law to issue one. But if issued a proper officer must have been found to serve it, and much routine followed out. With such searches in the sudden emergency of war necessary to be made throughout the country with all speed and efficiency, under the urgent orders of the President and Secretary of the Treasury, we hold the search and seizure, though without a warrant, was not unreasonable; and it is unreasonable searches and seizures alone that the Constitution forbids. This search and seizure was, as above recited, ratified by Congress ten days later, though we see no necessity for that. The ratification made it as good from the beginning as if Congress had on Dec. 8, 1941, specially authorized it. It is true the books and papers seized did not prove to have any invisible writing in

them, or to relate to any prohibited trading with foreign countries; but being in the lawful possession of the officers of the United States, if they disclosed some other crime, they might be used to prove it. *Gouled vs. United States*, 255 U. S. 298, 311. Neither the Constitution nor any statute in terms prohibits the use of the truth, even though unlawfully discovered, as evidence in the prosecution of a crime; but it is a federal judicial policy not to allow the agents and officers of the United States to break the law themselves and then use information so acquired to prosecute others. This rule of exclusion applies only to federal officers. In this case we are unable to see that the customs officers acted unlawfully, but only according to duty and with prudence and reasonableness. If, as suggested in argument, they had found the body of a murdered man in Nikko Inn, or evidence of any federal crime, they could tell about it. The books they found may likewise be permitted to speak.

2. The English books, on which the tax returns of Noro and Goto both were evidently based, say one thing. The Japanese books tell another story touching income. No explanation is offered. The jury could well conclude that the Japanese books, which only the Japanese could read, were for use among themselves and were true, no reason to make them false being apparent. The English books, which must then be the false ones, could be concluded to have been made for the very purpose for which they were used, to support false income tax returns. In this purpose Goto must have joined, for not only was he a partner in the business all the time, with access to the books, but he used the English books as the basis also of his own income tax returns. Moreover, in the returns of each, one-third of the income shown by the English books was returned, there being a third partner, Tani-

guchi, presumably equally interested. Taniguchi was also indicted, but had gone home to Japan. But there is evidence that in truth through part or all of the time Noro had a half-interest and the others a fourth each. There was a tax advantage in dividing the income into thirds, because Noro was not married but the other two were, and their personal exemptions covered income that Noro would have had to pay taxes on if he returned his full one-half. This fact again would show cooperation between Noro and Goto. It was testified that Noro and Goto were shown the recomputations of their taxes and given opportunity to explain, but did not. On the trial they offered no explanations, either by their own testimony or any other. It is argued for appellants that the Japanese books are all in one handwriting, and that it was probably that of Taniguchi, who has vanished, and that he alone may be responsible for these books. Supposing he was the bookkeeper, we can conceive of no reason why he should have kept a false set of Japanese books for his own private use, nor why if they were private he did not take them with him or destroy them. The jury were the judges of the force of the facts, and the true conclusions to be drawn from them. There was no error in submitting the case to them. The moderate sentences would be supported by any one of the counts.

JUDGMENT AFFIRMED.

A True copy:

Teste:

/s/ OAKLEY F. DODD

Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

(Seal)